UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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NARL REFINING LIMITED PARTNERSHIP,

Plaintiff,

v. 16 CV 404 (RA)

BP PRODUCTS NORTH AMERICA, INC.,

Defendant.

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New York, N.Y.
February 16, 2016
2:30 p.m.

Before:

HON. RONNIE ABRAMS,

District Judge

APPEARANCES

KING & SPALDING
Attorneys for Plaintiff
BY: BOBBY R. BURCHFIELD

HERBERT SMITH FREEHILLS
Attorneys for Defendant
BY: SCOTT S. BALBER
DAVID W. LEIMBACH
LIANG-YING TAN

(Case called)

THE COURT: Good afternoon.

I reviewed your joint letter and your draft stipulations, and I'm also in receipt of NARL's proposed briefing schedule and BP's opposition. As you know, I just passed to both sides a proposed stipulation taking into account what both sides had proposed. I'm happy to hear you out on it now. I don't want to waste this opportunity since you came in here in the rain to talk about it, but I did want to see if we're able to reach some kind of joint stipulation.

So I'm happy to talk about it now. If you need a few more minutes, I'm happy to give you more time. If you need more than that and you need to talk to your clients, I'm happy to give you the opportunity to do that as well.

So why don't I rephrase the question. Why don't you tell me what you think is most productive today and what you think you're in a position to do.

MR. BURCHFIELD: Your Honor, on behalf of the plaintiff, on an initial review, on my initial review, the stipulation does seem fair. And subject to discussing it with my client, it seems like the direction that the client may very well want to go.

THE COURT: Okay. Thank you.

All right, Mr. Balber.

MR. BALBER: Thank you, your Honor.

On my initial review, the stipulation does not seem doable.

THE COURT: Tell me why.

MR. BALBER: Sure. The predicate for our objection, your Honor, is that we cannot and should not be prohibited from acting pursuant to all the rights and obligations under the contract. And, respectfully, I think there's a little bit of a tension between the first paragraph and the second paragraph.

And, by the way, this is all with the caveat that I have zero authority whatsoever and I may send this to my client this afternoon and they may say this is the best deal in the world, jump at it.

THE COURT: Point to the exact wording that you're thinking about.

MR. BALBER: Paragraph 1 indicates that the parties will continue to perform their respective obligations under the contract. And paragraph 2 says that we reserve our rights under the contract at this time. Now, one of the rights under the contract is to terminate based upon certain circumstances. I'm not sure how to reconcile our commitment to perform with the reservation of rights which include the right to terminate.

So what I don't want to end up obviously doing at all costs, your Honor, is to be in a situation where we are at risk of running afoul of the order, the stipulation order. So that's my primary concern.

If I can just take a minute to update your Honor on where we are, and I don't want to avoid this question because I really truly appreciate your Honor's effort to try to find a solution. And we want a solution as well, but a couple of updates.

Most importantly, since last we met, two of the three arbitrators have been agreed upon. Those two arbitrators now have until March 8 to appoint the third arbitrator. Once the third arbitrator is appointed, this Court has -- and I'm going to say this respectfully -- has no business adjudicating this preliminary injunction whatsoever. There will be a panel appointed under both the agreement and the AAA rules. That panel can deal with any issues concerning preliminary injunctive relief. I have plenty of cases to cite if your Honor is interested.

THE COURT: March 8 is the date the third arbitrator will be recommended, appointed?

MR. BALBER: March 8 is the last date by which the two arbitrators who have already been appointed can appoint the third. If they can't agree by March 8, AAA will appoint the third.

THE COURT: So it could be we have our third arbitrator by March 8, but it could be that we don't.

MR. BALBER: If they don't agree and AAA appoints, it will be a week or so after that is our expectation. That's point one.

Point two, your Honor, is this preliminary injunction application was filed on January 19. It's been a month. The world hasn't come to an end. We haven't terminated the contract. We haven't stopped delivering crude oil. There continues to be no necessity for the Court to do anything now, including enter a stipulation that's going to create a circumstance whereby nobody is quite sure what our rights are and we're both at risk of running afoul of the Court's order.

And the last point which I think is an important one, your Honor, in their preliminary injunction application papers, they say it would take them three weeks to find an alternative source of crude oil in the event we terminate the contract. Well, putting aside that they're relying on letters that were sent in April of 2015, it's now been well in excess of three weeks since they filed their application, which would be ample time for them to have found an alternative source of a crude supplier without the need for this Court's intervention.

I really again am going to suggest what I suggested a couple weeks ago which is that the Court punt and let's keep this in abeyance. We're going to have an arbitration panel in the next three weeks or so. If we terminate the contract, Mr. Burchfield can hop on a plane, be up here. I'm sure your Honor will be extremely receptive to hearing him. But why are we doing this now and why are we invading the parties' contractual rights when there's no necessity.

Thank you, Judge.

MR. BURCHFIELD: May I respond, your Honor?

THE COURT: Sure.

MR. BURCHFIELD: On the first point, two of the three arbitrators have been appointed. By March 8 is when those two arbitrators are supposed to recommend a chair. Then that has to go through the vetting process at the AAA. That arbitrator will need to fill out the appropriate conflict of interest forms, and the parties will have I think 14 days to review it. So March 8 is by no means a hard deadline and it could very much, as your Honor suggested, go well beyond that.

Second point. The law is very clear, and the leading case in the Supreme Court is the *United States v. W.T. Grant* case. The leading case in this circuit is the *R.C. Bigelow v. Unilever* case that an assurance of continued compliance by someone faced with a preliminary injunction request is not good enough. If I may read briefly from the *R.C. Bigelow* decision.

THE COURT: Sure.

MR. BURCHFIELD: This is at 867 F.2d 102 at page 106 and I have copies. And if I may hand you a copy, your Honor.

THE COURT: Sure.

MR. BURCHFIELD: I'm at page 106, about a third of the way down the left-hand column.

"Nevertheless, it is also well settled that voluntary cessation of allegedly illegal conduct does not make a case moot. In such circumstances, there may very well remain a controversy to be settled since a defendant is free to return to his old ways. While this case may well be moot if the defendant can demonstrate that there is no reasonable expectation the controversy will reoccur, the defendant's burden in this regard is a heavy one."

In the next column, the right-hand column, about midway down, "We note that a disclaimer of intention to revive allegedly unlawful conduct does not suffice by itself to meet defendant's heavy burden in order to render the case moot."

That's what we have here is without even submitting an affidavit, your Honor, counsel is telling the Court BP is going to behave itself and if it doesn't, we can come back. What the Court has before it is a fully sufficient motion for preliminary injunction with legal brief and with affidavits indicating that there is a potential for imminent irreparable harm to my client. And all we're getting from BP is please come back when it's even more imminent.

The Court has made a reasonable proposal. Subject to running it by my client, this seems like a reasonable proposal. And the Court does indicate that BP is not giving up its rights under the contract. BP has never been specific either with my client or with this Court as to the circumstances under which it thinks it can walk away from this contract. What it has done, however, is refuse to off-load crude oil. It has refused to pick up refined products from my client until we demanded under threat of legal action that it continue. And it has never given us the assurances of adequate performance that we are due under the New York U.C.C. Section 609 and 610.

Final point, your Honor. He says that NARL could find a new supplier within three weeks. If there's a typo in our papers, I apologize for it. Mr. Amin's affidavit, paragraph 16, is quite clear. Let me read that for the record. This is the attachment to our original motion. It says in our estimates, it would require at least 90 days and possibly longer to locate, negotiate, and secure an alternative supply arrangement. That's not three weeks, that's three months. And I think that's being optimistic.

It's not a situation where when we filed this complaint we immediately began looking for an alternative supplier. NARL has a contract with BP, and what we're entitled to is assurances of performance. If they won't give those assurances of performance, we request the Court to step in and provide that.

THE COURT: Let me just make one more proposal with respect to the joint stipulation that I drafted based on what you had provided. If I changed what I gave you as follows, let me see if this is acceptable to defendants and, of course, plaintiff.

BP Products New York America, (BP), and NARL Refining Limited Partnership, (NR), together, the parties, will continue to preserve their respective rights and obligations under -- and then keep everything else in that paragraph the same and then cross out No. 2 and then have everything else the same. Does that present a problem? Does that make it closer for defendants? Would plaintiff have a problem with that?

I understand both of your positions. I'm trying to balance plaintiff's right to seek relief that it does with an effort to preserve the parties' resources, judicial resources in not litigating a motion that may not be necessary. So I'm just trying to balance that.

So does that change things for either side, recognizing that you have to go back to your clients.

MR. BALBER: Just so I make sure I have it right, will continue to preserve their respective rights and obligations.

THE COURT: Right.

MR. BALBER: I'm comfortable passing this along with the goal of hopefully bringing us to a resolution. I can't make any guarantees. But the prior iteration I wanted to be really candid with the Court that I didn't feel comfortable even advancing that with the client. This I'm comfortable having a conversation about.

THE COURT: Mr. Burchfield, do you have any objection to that language?

MR. BURCHFIELD: Your Honor, I just don't think that does it. I'm not quite sure what it means, preserve their respective obligations. If preserve is a synonym for perform, I think perform is more textually accurate. If it means something different than perform, I'm not quite sure what it accomplishes.

THE COURT: Can we think of a different word then?

MR. BALBER: This is exactly the problem, Judge. We've now hit on the crux of why we can't agree.

Let me add one more point to why perform just doesn't work. We had a number of force majeure events that have occurred between the parties over the past months, etc. What I don't want to happen is to have there be another storm or a fire or a tanker that runs aground or something like that that prevents one side or the other from performing and then we're in the context of, okay, they have not performed, are we in contempt of court.

And I ask this rhetorically, does the Court want to be adjudicating the question of whether a storm in the Atlantic Ocean justified the failure to perform or whether it was a pretense or whether when they wanted to send us what they have to send us in terms of refined oil they have a strike at the plant and they can't do it. That's why we have an arbitration panel that, as I said, is going to be appointed in a matter of weeks. Anything that's going to go to the question of the parties' performance or nonperformance squarely belongs in front of that panel. And to have this Court be required to adjudicate those questions is just -- I can't imagine the Court being equipped to do that based upon what's going to be before the Court on the record.

MR. BURCHFIELD: Your Honor, if I may, those examples sound like exactly the sorts of questions this Court can adjudicate in the context of a contempt hearing. I don't think it's necessarily the case that if a ship were lost at sea my client would run in here and seek contempt immediately.

What my client has observed on these force majeure declarations is a declaration that a specified ship that was supposed to deliver cargo to the refinery was fogged in in Houston when in fact that ship had only days earlier been in New York harbor. There's no way that ship could have delivered the cargo under the rules of physics and time and space because there was no way it could load the cargo and get to Houston and back in time to deliver it. That's the sort of thing my client is very concerned about.

BP has threatened three times -- twice in writing and once orally -- to terminate this contract. It has repeatedly invoked -- twice since they filed the arbitration demand and before we filed this complaint -- force majeure. And in one instance they tried to reject a cargo that had been independently inspected and approved. These are the sorts of things that are going on and my client is very concerned about whether performance is going to continue and that's why we're here in this court.

MR. BALBER: Mr. Burchfield has now without question proven my point. He will come back and seek contempt and your Honor will hold a hearing, an evidentiary hearing, in which we'll have Al Roker testify about the weather in Houston and we'll have a shipping expert testify about safety on the seas and an oil expert testify on what can be delivered or can't. Is that what this Court needs to be doing when we'll have a fully constituted arbitration panel that has been formed for the precise purpose of investigating, adjudicating, hearing evidence on the performance of these contracts in this esoteric world of crude delivery and refinery.

THE COURT: Here's what I'm going to do. I'm going to ask my law clerk to make the changes that I proposed. And I just ask you both to go back to your clients and see if it's agreeable by saying that you preserve. And, again, if you can think of a different word that should replace preserve the respective rights and obligations, let's see if that language is sufficient without the word perform and you'll let me know. And if not, I'll make a decision on your requests that are pending.

MR. BURCHFIELD: Your Honor, I'm sorry, may I?

THE COURT: Yes.

MR. BURCHFIELD: Where we are is that there is a fully sufficient motion for preliminary injunction pending. If we reach a resolution on this stipulation -- and based upon the dialogue that has occurred, I'm not optimistic, but I'll certainly take it to my client and make a go of it. But what we would like to do is move this forward by getting a response from the defendant.

THE COURT: Okay. So why don't we do this. Why don't we set a timetable for you to talk to your clients and get back to me on this proposal. We're revising it. And in the alternative, I will set a briefing schedule on the preliminary injunction.

So how much time do you think you need to talk to your clients and get back to me?

MR. BURCHFIELD: Your Honor, I think we can respond to the Court -- it's Tuesday -- we can respond by the close of business on Thursday.

THE COURT: Okay.

MR. BALBER: I think that should be sufficient, your Honor. Thank you.

THE COURT: If that's the case, if you get back to me by the end of business on Thursday, what would your proposal be with respect to how long defendants should have to respond?

MR. BURCHFIELD: Your Honor, as you may remember, when the defendants opposed our proposal, they proposed that they respond by February 11, last week. So I would think it's fair to give them until next Monday. What is the 19th, is that Friday?

THE COURT: Today is the 16th, right. The idea behind this stipulation is -- and, again, it is entirely up to you and your clients. There's no pressure whatsoever from me. I'm just trying to be helpful. But if it's not, so be it. But that essentially only gives them a day between the time when they've discussed this with their client with hopefully, you know, an effort to resolve this matter without litigation. So I think we need to give them a little more time than that to just focus on trying to resolve it amicably and, if not, responding.

MR. BURCHFIELD: How about next Monday, the 22nd.

MR. BALBER: That's not enough time for us, Judge. Again I have to ask the question where is the fire? It's been pending for a month. We haven't terminated. I will guarantee that if we terminate on Friday, I'm going to have a very angry judge to contend with. So let us have a week from Friday?

MR. BURCHFIELD: Your Honor, I can't forebear saying the pendency of this suit probably has gotten noticed within the structure of BP. I don't think BP while this case is before the court and our motion is live that BP is going to do something foolish like terminate the contract. If this case is dismissed and our preliminary injunction motion is withdrawn, I'm not quite as confident.

THE COURT: Well, part of what was in the proposed stipulation is that there was a withdrawal of the application but that the action is stayed. So the action stays with me. So if there is some reason to come back to me, there will be no delay. You'll come right back to me. I'll have a full understanding of the time sensitivity involved. But, again, that's entirely up to you.

MR. BURCHFIELD: I understand.

THE COURT: So why don't we say that in the event that you're unable to reach a stipulation, defendants will respond by the 24th, okay, which is Wednesday. And then any reply will be Friday, February 26, okay, because I know you want to move this forward.

MR. BURCHFIELD: Yes, your Honor.

THE COURT: So we're going to hand this out to you and then I will hear from you by the end of business on Thursday.

MR. BURCHFIELD: Thank you, your Honor.

MR. BALBER: One more administrative matter, your Honor.

THE COURT: Yes.

MR. BALBER: I hate to raise this but I don't believe Mr. Burchfield is admitted to this court. I don't believe a pro hac vice motion has been filed. I haven't wanted to raise this, but this is our second appearance. There's nobody else here.

MR. BURCHFIELD: I believe it has, but I'll check on that and I'll rectify that issue if necessary.

THE COURT: Check on that. There are lots of King & Spalding attorneys in New York who can assist with the process. So you'll let me know if that's an issue.

MR. BURCHFIELD: Thank you.

THE COURT: Thanks. Stay dry.

My deputy is looking on the docket and she thinks a motion for pro hac vice was entered.

THE DEPUTY CLERK: January 20.

THE COURT: So we're all set on that front. Thank you though.

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